

# Five Reasons to Question the Legality of a National Security Law for Hong Kong

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On 28 May 2020, the National People's Congress (NPC) resolved to authorize its Standing Committee (NPCSC) to enact a piece of national security law for Hong Kong. Would this decision be in contravention of the Basic Law? Some people may say that this is a stupid question. Maybe it is. But if the Central Government still claims to abide by the rule of law, and if the NPC is not above the law, then whether its decision would contravene the Basic Law is a serious question about the rule of law.

As a matter of law, there are at least five reasons why one could query the legality of the decision.

## Enacting Law on its own

First, Article 23 of the Basic Law clearly stipulates that Hong Kong shall enact laws "on its own" to prohibit any act falling within the ambit of national security as defined in that article. The phrase "on its own" is of crucial importance. As Hong Kong retains a common law system which embodies a set of values on personal liberties and freedoms or the rule of law which are not shared by the socialist civil law system on the Mainland, and given the political sensitivity of national security law which carries criminal sanctions and threatens personal liberty, it was agreed in the Basic Law that such laws shall be enacted by the Hong Kong legislature in accordance with the distinct common law traditions, values and procedures. The reason to have the phrase "on its own" is to protect the integrity of the common law system and freedoms of the people of Hong Kong from the threat of arbitrary political prosecution. At the time of the drafting of the Basic Law, there were widespread concerns about the prevalence of counter-revolutionary crimes on the Mainland. The famous trial of the human rights activist Wei Jingsheng, who was convicted and imprisoned for 14 years for publishing an essay "The Fifth Modernisation" on the Democracy Wall in Beijing in 1978, was fresh in the minds of many people in Hong Kong. The phrase "on its own" was inserted to allay the worries of the people of Hong Kong.

Thus, the overall design of the Basic Law is to give Hong Kong the autonomy to enact its own law. The Central Government will not enact law for Hong Kong, nor will national law of the Mainland be extended to Hong Kong. The Central Government then asked, what about national law dealing with foreign affairs, defence and matters outside the autonomy of the HKSAR? Article 18 was drafted to allow national laws to be extended to the HKSAR, but such laws are confined

to foreign affairs, defence and matters outside the autonomy of the HKSAR. This formulation still gave rise to the worry about national security law, which may fall within the scope of foreign affairs and defence. Thus, Article 23 was drafted to craft out this area of law to be enacted by Hong Kong “on its own”. The suggestion that the Central Government has a parallel power to make national law for Hong Kong is clearly inconsistent with the intention and drafting history of Article 23.

Some people argued that Article 23 only imposes an obligation on the HKSAR to enact national security law; it does not exclude the NPC or the NPCSC from making national security law for Hong Kong. Nor does the fact that the NPCSC making national security law for Hong Kong exempt Hong Kong from its responsibility to enact national security law under Article 23. This argument does not really address the question. The whole point of inserting the phrase “on its own” is to ensure that the Central Government will not impose its national security law on Hong Kong. This phrase would be absolutely meaningless and its protection would be illusory if it means that the Central Government could do exactly that. If the Central Government wants to do that, it has to first amend the Basic Law and pay the political price for doing so.

## **Specific Provision Prevails over General Provision**

Secondly, a general principle of statutory interpretation is that a specific provision would prevail over a general provision. Article 18 is a general provision which allows the NPCSC to extend national laws to Hong Kong via Annex 3, whereas Article 23 is a specific provision dealing with national security. As a matter of interpretation, the scope of Article 18 would not include the specific matters set out in Article 23, which are left to Hong Kong to enact laws on its own.

Further, Article 18 only applies to national laws. Some people argue that the term “national laws” is used in contradistinction to “local laws”, and simply means any laws enacted by the NPC or the NPCSC. This interpretation may be valid in the general circumstances, but it is clearly inappropriate in the context of Article 18. The laws referred to in Article 18 have to be in the areas of foreign affairs, defence and matters outside the autonomy of the HKSAR. These are not matters that would fall into the jurisdiction of any local authorities, provinces or autonomous regions, but matters for the NPC and NPCSC. Thus, national laws could not be defined in terms of the organization making the law, which would make the term “national laws” meaningless, but have to mean territorial coverage of the law. The point is that these laws are made for the whole country and extended to Hong Kong. It reflects the concern that the Central Government should not make specific laws for Hong Kong. This is reinforced by the fact that the power to make law for Hong Kong is vested in its Legislative Council; that Art 23 confers on Hong Kong the power to make laws for those matters specifically defined therein; and that Article 18 confines the types of national laws that could be extended to Hong Kong. When these provisions are read together, the obvious purpose is to protect the integrity of the common law system in Hong Kong, which is completely different from the system in the Mainland.

Some people argued that the Garrison Law is a piece of law made by the Central Government for Hong Kong. This is not accurate, as the target of the Garrison Law is the People's Liberation Army stationed in Hong Kong. It defines the duties and responsibilities of the Garrison, and does not concern or affect the rights of ordinary citizens in Hong Kong. In contrast, the national security law will infringe the rights and liberty of the people of Hong Kong which are protected by the Basic Law.

## **PRC Constitution does not empower the NPC to ignore the Basic Law**

The above analysis shows that there is no power on the part of the NPC/NPCSC to make national security law for Hong Kong under the Basic Law, which is binding on the NPC. The NPC decision refers to various sources to purportedly justify this power.

Article 31 of the PRC Constitution authorizes the NPC to set up a Special Administrative Region. It is on the basis of this Article that the Basic Law was enacted. Article 11 of the Basic Law expressly stated that the systems and policies practised in the HKSAR, including the system for safeguarding the fundamental rights and freedoms of its residents, the legislative and judicial systems, shall be based on the provisions of the Basic Law. Article 11 thus reinforces the proposition that the power of the NPC to deal with Hong Kong is indeed confined by the Basic Law by virtue of Article 31 of the PRC Constitution and hence its decision cannot contravene the Basic Law. Article 62(2) of the PRC Constitution said that the NPC has the power of supervision of the constitution. Article 62(14) provides that the NPC has the power to decide on the establishment and the systems of the Special Administrative Region. This has been done through the Basic Law. Article 62(16) states that the NPC shall exercise other functions of the highest national organs. None of these general provisions authorizes the NPC to act other than in accordance with the Basic Law.

As pointed out above, this does not mean that the NPC has no power to address national security issues. This can be done, but this can only be done by amending the Basic Law first, such as repealing the phrase "on its own" in Article 23 and expressly conferring the power on the NPCSC to make law for Hong Kong. This would require a formal amendment of the Basic Law, and there will be political costs.

There are proper procedures for amending the Basic Law, and this cannot be done by a decision or resolution of the NPC. Such amendments would have a profound impact on the design of One Country, Two Systems, but if the Central Government is to amend the Basic Law in a way that would change or abandon One Country, Two Systems, there is at least nothing in law that could prevent it from doing so. What it cannot do is to legislate for Hong Kong as if the Basic Law does not exist.

## **The Role of the Court in Protecting Human Rights**

Fourthly, it has been pointed out that the scope of the proposed national security law is not exactly the same as that under Article 23. Yet this only gives rise to greater

concerns. The NPC decision authorizes the NPCSC to enact law to prohibit “acts of secession, subversion, organizing and implementing terrorist activities that would seriously endanger national security and interference with Hong Kong affairs by collaboration with foreign bodies outside Hong Kong and the Mainland.” The scope is exceedingly broad, and may cover finance, economy, communications, and even connection and collaboration between religious organizations and NGOs with foreign religious bodies and NGOs. It may even cover normal academic collaboration between local universities and foreign bodies.

Even more worrying is the diminishing role of the courts. Under Article 18 of the Basic Law, any laws which are extended to Hong Kong have to be related to foreign affairs, defence or matters outside the limits of the autonomy of the HKSAR. Under Article 19, these matters are outside the jurisdiction of the courts in Hong Kong. Thus, unless there is express authorisation in the national security law, these matters are logically outside the jurisdiction of the Hong Kong courts. Even if the courts were conferred jurisdiction over the national security law, should the courts interpret the law according to Chinese law or the common law principles of interpretation? The Mainland approach to statutory interpretation is dominated by political consideration and less restrained by the language of the law. This is best illustrated by how the NPCSC is able to extend a requirement to take an oath of office upon successful election under Article 104 of the Basic Law to become an eligibility requirement of allegiance for candidacy to run for the election, and how the China Liaison Office has argued that it is not a department of the Central Government for the purpose of Article 22 of the Basic Law and hence it is free to interfere with internal affairs of the HKSAR under its alleged authority to supervise the implementation of the Basic Law. I have full confidence in our judiciary that they would adhere to the common law principles in interpreting the national security law, but this would give rise to another problem. What is going to happen if the Hong Kong courts, applying the ordinary canons of statutory construction, substantially restrict the scope of an offence under the national security law, or declare a provision in the national security law null and void for contravening the human rights protection in the Basic Law? Would the NPCSC give the Hong Kong courts a round of applause, or would it be tempted to “correct” the Hong Kong judiciary for failing to properly understand the national security law? In this regard, it should be noted that the NPCSC has the power to give an interpretation of the national security law, being a piece of national law, under Art 42 of the Legislative Act. While such interpretation is not an interpretation of the Basic Law, it has the same status as the national law itself under Art 47 of the Legislative Act, and is hence binding on the Hong Kong courts. How much freedom would the Hong Kong courts enjoy in interpreting the national security law?

This gives rise to another issue: would the national security law be subject to the human rights protection under the ICCPR as applied to Hong Kong or the human rights provisions in the Basic Law? Under Art 78 of the Legislative Act, when there is a conflict between national law and local law, national law prevails. Therefore, the national security law would prevail over the Bill of Rights, which is local law of the Hong Kong. The ICCPR as applied to Hong Kong receives a higher status, not by virtue of the Bill of Rights, but by virtue of Article 39 of the Basic Law. However,

the Basic Law itself is also a piece of national law. If two provisions of national law are in conflict, the specific provision will prevail over the general provision, and the latter will prevail over the earlier provision. Article 39, as well as other human rights provisions in the Basic Law, may be regarded as a general provision, and if the national security law, which is a specific law and latter in time, is inconsistent with the Basic Law, the national security law will prevail under Articles 83 and 85 of the Legislative Act. Thus, there seems to be strong arguments that the national security law is not subject to the ICCPR as applied to Hong Kong or other human rights provisions of the Basic Law.

It has also been suggested that there should be a special tribunal to handle cases about national security, and such cases should only be tried by judges who have no foreign nationality and no right of abode in a foreign country. This suggestion would threaten the rule of law and judicial independence. National security law could cover activities that may also constitute ordinary crimes, such as arson or possession of offensive weapon. If a defendant is charged with the ordinary crimes, he will be tried by the ordinary courts. If he is charged for the same activities under national security law, he will be tried by a special tribunal. This would give rise to legitimate doubt of fairness and impartiality. Historically, such special tribunals, such as the Star Chambers in England in the 15<sup>th</sup> to 17<sup>th</sup> century or the special counter-revolutionary tribunal in Russia in the early 20<sup>th</sup> century, earned their reputation as a political tribunal for social and political oppression through arbitrary use and abuse of power.

A nationality requirement for the appointment of judges would be inconsistent with the Basic Law. Article 92 provides that judges and other members of the Hong Kong judiciary shall be “chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions”. Indeed, apart from the Chief Justice and the Chief Judge of the High Court, it was a deliberate decision not to impose any nationality requirement on other judges. Article 82 of the Basic Law expressly permits the Court of Final Appeal to invite judges from other common law jurisdictions to sit on the Court of Final Appeal. Under the common law, the judges take a judicial oath to administer the law fairly and impartially. This duty does not depend on his nationality. If there is any allegation of bias or conflicts of interests, this can already be handled under the existing system. If a nationality requirement is to require a judge to approach a case with patriotic principles, this will be an affront to the principle of judicial independence.

## **Establishment of a National Security Unit in Hong Kong**

Fifthly, the NPC decision envisages that the National Security organization may, if necessary, set up a unit in Hong Kong to protect national security in accordance with law. It is unclear what this unit would be, but it is unlikely to be a “department of the Central Government” under Article 22 of the Basic Law, but the representative of the Central Government that is not bound by Article 22. What is the scope of its authority? What power would it have? To whom is it accountable? Could it exercise

the power of investigation, arrest and detention, or interrogation? Under Article 42 of the PRC National Security Law, national security organization shall have the power to investigate, detain, interrogate, arrest, and other power as prescribed by law. In short, it enjoys the power of law enforcement, and how could the operation of a parallel police force in Hong Kong be consistent with the Basic Law?

## **The Tragedy of One Country, Two Systems**

The past few weeks have witnessed a dramatic constriction of public space in Hong Kong. The Liaison Office of the Central People's Government in the HKSAR claimed that it is not a "department" of the Central Government within the meaning of Article 22 of the Basic Law, and that it has the power to supervise the implementation of the Basic Law in Hong Kong. The Education Bureau put pressure on the Hong Kong Examinations and Assessment Authority to set aside an examination question of a public examination (HKDSE) on the ground that the question is biased and inappropriate. The question asked the students to comment whether Japan has done more good than evil to China between 1900 and 1945. Then the Communications Authority found substantiated the complaints against a political satire by the Radio and Television Hong Kong (RTHK) on the ground that the popular satirical programme has "denigrated" the Police Force by making fun of the police. And then the NPC decided to authorise the NPCSC to enact national security law for Hong Kong. How much of "a high degree of autonomy" is still left with Hong Kong?

The only difference between the two systems in Hong Kong and the Mainland now is the legal system. In order to protect the common law system in Hong Kong, the design of the Basic Law is that Hong Kong will enact its own law, that Mainland law will not apply and the Central Government would not make law for Hong Kong, and that Hong Kong law will be enforced by the Hong Kong law enforcement agencies, and administered by the Hong Kong judiciary. These are the pillars that protect the common law system, and all these pillars are now shattered. The Central Government is going to make law for Hong Kong; national security organization is allowed to carry out law enforcement in Hong Kong, and it is unclear whether the national security law will be administered by the Hong Kong courts, and even if it is so, it is unclear how much autonomy the Hong Kong courts would have over the interpretation of the national security law.

Some people said that if Article 23 legislation had been introduced in 2003, we would not have been in the position where we are now. There are too many assumptions in such an argument. The recent protests are a result of many different causes.

About a decade ago, the former Premier Wen Jiabao reminded the HKSAR Government to address the "deep-rooted causes and conflicts" in Hong Kong, but successive governments only paid lip service to this advice. Instead, the former Government became a major source of conflicts and was a key player leading to sharper polarisation in society, whereas the present Government is too arrogant and missed many opportunities to resolve the social conflicts last year. The situation was further complicated by the Sino-American trade conflicts. Even if Article 23 law were enacted in 2003, with the poor performance of the last two governments of the

HKSAR, the social conflicts would probably still be inevitable. To many people in Hong Kong, the current problem is largely one of public disorder and has little to do with national security.

To the Central Government, there seems to be a conspiracy theory that the protests were part of a conspiracy of foreign powers against China. Instead of making the successive Chief Executives accountable for their poor governance, the Central Government is prepared to adopt radical steps that could destroy One Country, Two Systems. How far the NPC decision was the effect of those who have the ears of the Central Government exaggerating the situation in Hong Kong is something only history could tell. Would the current problem in Hong Kong be resolved by enacting the national security law? There will be prosecution, suppression and censorship.

The national security law may have a chilling effect so that people will no longer criticize the authority. There will no longer be any civil society, and independent and critical thinking would become non-existent. On one hand, the Government criticized the critics for demonising the national security law when they do not even know the content of the law. On the other hand, senior government ministers and many patriots were mobilised to pledge their support for the national security law without knowing their content! Hong Kong will become nothing but a compliant society. Political correctness will become the major yardstick in determining right and wrong.

Public space will continue to shrink; a high degree of autonomy will exist in name only. Some people said that the national security law will only target at a small number of criminals. History tells us that this is naïve. Once introduced, instead of being liberalized, such law will only become increasingly oppressive. “Four legs good, two legs bad”. Before long, some four legs would be found bad as well!

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